

209875

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket 34425

CITY OF LINCOLN --
PETITION FOR A DECLARATORY ORDER



ENTERED
Office of Proceedings

JAN 16 2003

Part of
Public Record

RESPONSE BY
CITY OF LINCOLN
TO VARIOUS SUPPLEMENTAL REPLY FILINGS BY
LINCOLN LUMBER COMPANY
and
STATEMENT OF MOOTNESS CONCERNING
REQUEST FOR AN ORDER
COMPELLING DOCUMENT DISCOVERY

I.

This Response is filed on behalf of City of Lincoln to various post-December 29 filings in the nature of further Replies and Supplemental Replies by Lincoln Lumber Company (LLC) in the above-captioned proceeding. Under the schedule established by this Board, LLC was required to file its Reply to City of Lincoln's Petition for a Declaratory Order on or before December 29. LLC did so, and City of Lincoln has timely filed a Rebuttal to that Reply. Through January 12, 2004, LLC has filed three additional supplements to its Reply. City of Lincoln responds to these additional filings as follows:

1. LLC Filing of its Document Response (STB website Jan. 7). On or about January 7, 2004, City's outside counsel received a cover letter from Mr. McFarland (counsel for LLC) indicating that Mr. McFarland was filing copies of LLC's "responses to discovery." The cover letter stated that the

originals has been earlier provided to City. On December 30, 2003, Mr. Hamill did deliver to City's in-house counsel (Mr. Pedersen) certain documents which Mr. Hamill represented were LLC's response to City's document requests. City has not yet ascertained if what LLC filed with this Board on 7 January 2004 in fact is what Mr. Hamill delivered to Mr. Pedersen on 30 December 2003. City should not have to incur the burden of doing so, or of considering further response, as explained below.

49 C.F.R. § 1114.21(f) provides that discovery materials, including responses to document requests, "shall not be filed with the Board." To the contrary, such materials, or portions thereof, "shall be appended to the appropriate pleading when used ... as an evidentiary submission." Upon initial examination of LLC's document response of December 30, City concluded that the only possibly meaningful evidence in that response was the log of railcar shipments and description of their contents. As required under this Board's rules, City attached these documents to the Rebuttal Verified Statement of Mr. Pedersen (who received the documents from Mr. Hamill), and City's outside rail operations expert made reference to these documents in his Rebuttal Verified Statement.

However, the filing of the discovery materials in their entirety by LLC was contrary to 49 C.F.R. § 1114.21(f). Moreover, it was filed on the very day (January 7) that City of Lincoln had to send off its Rebuttal in order to meet the

Board's requirements for a timely filing of that Rebuttal. The City thus had no opportunity to respond to LLC's violation of §1114.21(f). It is prejudicial to the City for LLC to clutter the record of this proceeding with documents filed in violation of § 1114.21(f). The filing not only burdens the City with the need for a possible substantive response, but also obscures the record for possible future review. Moreover, other than the log of railcars, the documents tendered by LLC based on LLC's discovery analysis were irrelevant, or are filled with self-serving and hearsay statements of no weight or reliability.¹

In sum, the entire filing should be stricken as, among other things, a violation of § 1114.21(f).²

¹ City notes that LLC complains in a Letter dated January 14 that City did not timely file or serve LLC with its Rebuttal. By letter dated January 15, City has responded that LLC was served. However, it is interesting to note that LLC failed to serve the discovery documents which it filed on January 7, apparently on the theory that its principal had supplied copies to City officials earlier. Although this probably is a technical violation of service rules, because the documents when originally tendered were not associated with any filing, the prejudice to the City flows not from this technical violation of service requirements, but instead from the very filing itself, which is not only beyond the due date for LLC's Reply but also not associated with any pleading.

² The cover letter for the January 7 discovery document filing (from Mr. McFarland dated January 6, 2004) claims that City of Lincoln, in filing a motion for an order to compel responses, "unjustly disparaged the reputation of Lincoln Lumber Company, its President and its counsel." City responds to this statement in order to make clear that it intended no attack on anyone's reputation. As to the discovery, the record will reflect that the City filed a request for entry as well as documents on or about November 24, 2003. The discovery was aimed at securing information for City's Rebuttal, which this Board scheduled for filing on 8 January 2004, ten days after the due date for LLC's reply. City's discovery request bearing on entry sought such entry on or before December 15 in order to

2. McFarland Dec. 29 letter. On December 30, LLC filed an additional document supplementing its December 29 Reply. The additional document [Letter, Mr. McFarland (counsel for LLC) to Mr. Williams (Secretary, STB), dated December 29] states that LLC relies on Exhibit K rather than Exhibit O to Mr. Hamill's Verified Statement (filed with LLC's Reply on December 29) for purposes of alternative routes for the Husker Link Trail.

In Exhibit K, LLC appears to call for the Trail to be located either in Lincoln Housing Authority (LHA's) parking lot at 23d Street, and then routed north to "Y" Street, or for the Trail to be routed north to "Y" Street before entering the LHA parking lot. Exhibit O (which LLC per its December 29 letter

compile information useful for the rebuttal.

LLC did not object to entry, until belatedly when, on December 11, City by letter among other things sought to confirm with LLC that entry would occur on December 15. By letter dated the same day, LLC by its counsel informed City that it would regard such entry as trespass. LLC's counsel also subsequently pointed out to City's counsel that discovery requests in the nature of requests for entry and for production of documents are not self-executing (i.e., can be ignored with impunity unless this Board issues an order requiring a response, see 49 C.F.R. § 1114.31(a)&(b)). Because the briefing schedule was necessarily short leaving no room for a last-minute motion practice, and because last minute objections had been interposed to the entry request, City of Lincoln prudently filed a motion for an order not only as to entry but also as to the documents. City does not believe that this should be construed as a "disparagement" of LLC or its counsel but rather as a compliment for LLC's and its counsel's litigation prowess. In response to City's motion for an order, LLC agreed to permit entry (on December 19), and committed to a document response. City promptly withdrew its motion for an order to permit entry, and requested that its motion in connection with the document response be held in abeyance. See STB order in this proceeding issued December 24, 2004. The entry produced evidence used by City of Lincoln in preparing its Rebuttal. The document requests produced evidence (namely the log of railcars received) used by City of Lincoln in preparing its Rebuttal.

now disavows) encompassed LLC's prior agreement (as represented in LLC's Letter dated November 18 filed with STB) to allow the Trail on the northern 20 feet of the LLC-owned right of way from 22d to 19th Streets.

In City's Rebuttal at pp. 22-24, and in the Rebuttal Verified Statements referenced therein, City explains how none of LLC's proposed northern re-routes is feasible. City also notes that LLC per Mr. Hamill appears also to suggest an entirely new option (in Exhibit T to Hamill's Verified Statement, filed with LLC's Reply). City Rebuttal at p. 24. Since LLC's December 29 letter indicates that LLC relies on Exhibit K as the "alternative" location for the trail which LLC advocates, then Exhibit T would appear not only to be unreliable hearsay but also totally irrelevant, because it appears to discuss an entirely different alternative location to the south of the right of way rather than to the north. In any event, the alternative in Exhibit T which LLC now impliedly disavows is also deficient for the reasons stated in City's Rebuttal at p. 24 and in the referenced Verified Statement of Mr. Genrich. City has carefully evaluated all alternatives and found them infeasible, less safe and inconsistent with relieving congestion.

3. McFarland 5 January letter with errata. By Letter dated 5 January 2004, LLC's counsel (Mr. McFarland) tendered a two page set of corrections dated 4 January 2004 to Mr. Hamill's verified statement (filed with LLC's December 29 Reply).

While City of Lincoln does not object to filing of corrections, this does not mean that City waives any objection or argument to purported evidence which is hearsay in nature, or which City contends amounts to "staged" photographs which allegedly support an argument to which no weight should be given. For example, Mr. Hamill's errata sheet purports to clarify Exhibit T, but Exhibit T and the alleged clarification is a classic self-serving statement containing unreliable hearsay; after LLC's December 29 letter Exhibit T and thus its clarification is irrelevant; and for all these and other reasons, Exhibit T or arguments based upon it should be accorded no weight. See City Rebuttal at pp. 27-28 and Genrich Rebuttal V.S. at ¶5. In short, the errata do not correct the deficiencies in LLC's position.

II.

Inasmuch as LLC has purported to respond on December 30 to City of Lincoln's discovery request, the motion for an order to compel a response (which Lincoln had requested to be held in abeyance pending a response) is hereby withdrawn as moot.

Respectfully submitted,




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Certificate of Service

I hereby certify that copies of the foregoing Response to Supplemental Filings (and accompanying response to Jan. 14 letter) were served as indicated below this 11th day of January 2004, upon the following representatives of parties or commenters:

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pre-paid, first class or equivalent)


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